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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 551.

CURACAO TRADING COMPANY, INC.,
Petitioner,

against

FEDERAL INSURANCE COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Statement.

The brief in opposition to this petition for a writ of certiorari itself establishes the issues upon which petitioner is entitled to the relief which it seeks.

POINT I.

The finding below of lack of title in physical goods was not established by the reclamation order.

The Reclamation Order was in a proceeding to which the respondent was in no way a party and in which it had no interest and by which it was not bound.

(a) The Reclamation Order did not constitute competent evidence in this action because it was between different parties:

> *Brown* v. *Fletcher's Estate*, 210 U. S. 82;
> *Ingersoll* v. *Coram*, 211 U. S. 335;
> *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 443.

(b) The original Reclamation Order was resettled by the District Court for the express purpose of limiting its effect to the Reclamation Proceeding and excluding it from consideration in this action (see, In re Harbor Stores Corporation, 33 Fed. Sup. 360, 362), in which Judge Goddard held:

> "* * * the determination of the Referee was limited to a finding that the petitioner (Curacao Trading Company) has no rights in the property sought to be reclaimed equal to or superior to that of the successful claimants. * * * It may have some rights although not as against the true owners and it ought not to be prejudiced by the recitals contained in the degree of August 8, 1939 in a determination of these rights in another proceeding."

(c) The case of *Fletcher* v. *Evening Star Newspaper Co.* (114 Fed. [2d] 582, 583, certiorari denied, 312 U. S. 694), upon which the respondent heavily relies and which it quotes at page 10 of its opposition brief, does not destroy the limitation upon the doctrine of res adjudicata or overcome the objections mentioned in (a) and (b) above. The *Fletcher* case was decided by Mr. Justice Rutledge of this Court, then sitting as Associate Justice of the United States Circuit Court of Appeals for the District of Columbia. In that case the appellant sued in a libel action because the respondent had referred to his disbarment and the respondent relied upon an adjudication of disbarment to

establish the truth of what it said. Upon this narrow issue, it was held that the doctrine of res adjudicata did not apply. What was really involved was akin to privilege which is limited to libel actions. A newspaper, reporting a judicial proceeding is naturally not to be limited to the strict principles of res adjudicata in determining its responsibility in libel else this type of privilege would be vitiated. What was held in that case was quite properly that the doctrine of res adjudicata did not apply. In this case, however, it is the respondent who relies on res adjudicata and is bound by its limitations.

POINT II.

The finding below of lack of title in physical goods was predicated upon documents neither offered nor admissible in evidence.

It is true that Garcia has testified that the cocoa represented by the petitioner's warehouse receipts was not in the warehouse. Such testimony, however, was not in this case but in the Reclamation Proceeding. Even there, it does not appear that Garcia had any personal knowledge as to what was in the warehouse. On the contrary, cocoa beans answering the description contained in petitioner's certificates were actually received, counted, sampled and graded on behalf of petitioners. (See *Marcone Report*, *Vanderveygh* Ex. 3, 160, *Kehrer*, 172, 177.)

Garcia's testimony and the respondent's assertions are directly put in issue by the warehouse receipts which were executed by the secretary of the warehouse corporation and constituted presumptive evidence of the existence of the cocoa beans and of the validity of petitioner's interest therein. The respondent's entire proof on this point did not rest on warehouse records, but upon the incompetent hearsay affidavit of John J. McMackin, former secretary of the defunct Harbor Stores Corporation. The

choice of McMackin to allege invalidity of the warehouse receipts was a desperate choice of last resort for it was McMackin himself who issued and signed the warehouse receipts in question. Thus, we have the strange situation of (a) the respondent submitting one McMackin affidavit dated May 26, 1942 (McMackin Reply Aff., 440-476), (b) the petitioner a few days later submitting an affidavit in rebuttal thereto by the same McMackin (McMackin Rebuttal Aff., 591-606) in which he absolutely contradicts himself on every count and (c) the lower Court arbitrarily accepting the respondent, McMackin, against the petitioner, McMackin.

The respondent's McMackin affidavit was purely hearsay and inadmissible since McMackin had no personal knowledge of the facts therein contained or as to the ownership of the particular cocoa beans he described. The best evidence was the records themselves (*Richardson on Evidence,* Sec. 205), yet those records were not even introduced into evidence by the respondents. There is no statement in the affidavit that McMackin had personal knowledge or that the books and records were kept under his direction. It should be noted that Harbor Stores Corporation is a successor to Insular Terminal Corporation upon whose alleged records the prior history of the so-called other warehouse receipts rests. McMackin is in no better position to speak of those records than any man in the street because, as he says, "As far as the original Insular Terminal warehouse receipts are concerned, I was not an officer of that corporation and did not execute any of the same and I have no personal knowledge as to the accuracy or validity of said warehouse receipts." The same thing is said of the other records (602-603).

In the petitioner's McMackin affidavit, McMackin says that the records were not made up by him or in his presence or under his supervision and, "I have no personal knowledge of how they were made up, nor do I have any knowledge of their accuracy" (599-600). He

clearly states (599-600), "I had nothing to do with checking in the cocoa, nor did I have any duties to perform at the warehouse in Long Island City, nor did I actually perform any acts at the warehouse, other than installing a boiler there in 1938. The warehouse was in Long Island City. I was at the Manhattan office of the Insular Terminal Corporation, 99 Wall Street."

Despite the above facts, the district Judge says of these alleged records: "They speak for themselves and, being kept in the regular course of business, are entitled to recognition as evidence and they stand uncontradicted in any respect whatever by any allegation of fact made in any of the plaintiff's affidavits" (807).

We challenge the respondent to point out where these alleged records appear in this record. They neither did nor do. Therefore, the finding of the Court below seems almost incredible and, as the alleged records are the keystone of the decision, reversal is clearly demanded. *Boerner* v. *United States*, 26 Fed. Supp. 769; *Banco De Espana* v. *Fed. Res. Bank of N. Y.*, 114 Fed. (2nd), 438, 445; *In re Byoir & Associates, Inc.* v. *Tsune-Chi-Yu*, 36 Supp. 963 —where the Court held that where veracity is in issue summary judgment must be denied.

The respondent's McMackin affidavit was not the best evidence of the contents of the record. The records themselves should have been produced. *Neff* v. *Palmer*, 131 Misc. 671; *Gardenswartz* v. *Equit. L. Ass. So. of U. S.*, 68 Pac. (2nd) 322; *Currey* v. *Mackenzie*, 239 N. Y. 267, 269 (Cardozo, J.). Yet, the respondent made no attempt to produce any original papers or to tender any reason or excuse why they were not produced. On the contrary, without proper foundation it relied on the McMackin affidavit which, even as secondary evidence, only insufficiently referred to book entries and other records and lacked the required attestation of personal knowledge. *Houghton Mifflin Co.* v. *Stackpole Sons, Inc., et al.*, 113 Fed. (2nd) 627, 628 (C. C. A. 2).

Apart from the requirements of Rule 56, defendant's alleged proof on the above issue violates every known rule of evidence. In the first place, there is enough in the record to indicate that some doubt must be thrown on the honesty and accuracy of the warehouse records generally. An affidavit by Joseph J. Millman, an accountant, was submitted by petitioner which gave documented proof of the inaccuracy of the warehouse records relied upon by respondent (607-627).

Even if the records had been admitted in evidence, cross-examination would have been necessary to test their veracity. However, it is obvious that there is no proof that the non-existent records were ever made in the regular course of business. As was said in *Wigmore on Evidence, Fourth Edition,* Sections 1523, et seq., there must be proof that records were made in the regular course of business, contemporaneously with the transaction and with no motive to misrepresent,—all of which elements are not present here. Further, personal knowledge of the entrant must be shown (Sec. 1530); the original books must be produced (1532); and the books must have an honest appearance and "no suspicion of false dealing must be apparent" (1551). These principles were approved by this Court recently in *Hoffman* v. *Palmer,* 129 Fed. 2, 976, 981, aff'd. U. S. Supreme Ct., 63 Sup. Ct. 477; *Evans* v. *Rogers,* 159 N. Y. S. 898. Alleged warehouse entries were involved in *Williams & Morford Co.* v. *Stokes,* 158 N. Y. S. 89, and were rejected because they were not the original entries.

Furthermore, there is not an iota of proof that the cocoa beans claimed to be owned by others are the identical cocoa beans involved in the Garcia transaction. *Sonken-Galamba Corporation, et al.* v. *Atchison, T. & S. F. Ry. Co.,* 28 F. Supp. 456. Books to prove third party transactions are inadmissible. The books must relate to transactions between the parties, as was held in *Perrine* v. *Hotchkiss,* 58 Barb. 77. See, also, *Rathborne* v. *Hatch,* 80

App. Div. 115; *Matter of Roge* v. *Valentine*, 255 App. Div. 475 (reversed on other grounds, 280 N. Y. 268); *Kittredge* v. *Grannis, et al.*, 236 N. Y. 375. The New York Court of Appeals in interpreting Section 374a of the Civil Practice Act referring to book entries, which is similar to the Federal Statute, said:

> "It was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." (*Johnson* v. *Lutz, et al.*, 253 N. Y. 124, 128.)

The very claim of conflicting receipts urged by respondents, the two contradicting McMackin affidavits, and the conflicting records of Harbor Stores all compel the rejection of the respondent's proof which at best created an issue.

Therefore, attention is particularly directed to the certificate of insurance, issued by the respondent, confirming its issuance in favor of the petitioner, and included in the separate volume of exhibits submitted to this Court, to wit:

"$112,644.80—As per specifications— No. F532685

FEDERAL INSURANCE COMPANY,
90 John Street, New York, N. Y.
CHUBB & SON, Managers

New York, April 3, 1939

THIS IS TO CERTIFY that on April 3, 1939 this Company insured under policy No. O-54711 for CURACAO TRADING COMPANY, INC. on 18,480 bags Cocoa Beans valued at market value on date of loss, as per back hereof located at Harbor Stores Corporation, #4460-#4486—5th Street, Long Island City, N. Y. from April 3, 1939 to date or dates of removal and it is hereby understood and agreed that, in the case of loss, such loss is payable only in New

York to GRACE NATIONAL BANK &/or THE ASSURED, as interest may appear on surrender of this certificate.

This Certificate represents and takes the place of the policy as fully as if the property were covered by a special policy subject to such risks and conditions as shown in the margin hereof and conveys all the rights of the original policyholder (for the purpose of collecting any loss or claim) direct to the holder of this Certificate and free from any liability for unpaid premiums.

In the event of the cancellation of the policy or endorsement under which this Certificate is issued, this Certificate is hereby cancelled upon notification to the holder prior to the expiration date shown thereon.

Not Valid Unless Countersigned By

WILLIAM STAKE AND COMPANY, INC,

Countersigned

WILLIAM STAKE AND COMPANY, INC.
William Stake & Co., Inc. (red stamp)
S. MILLER (Sgd.)
Atty. in Fact (red stamp)"

The issuance of said certificate is proof conclusive that, in the contemplation and intent of the respondent, the petitioner had insurable title in and to the cocoa stored with Harbor Stores Corporation.

Furthermore, against the respondent's proof stands the warehouse receipt (included in the separate volume of exhibits) which is for the same guaranty of cocoa referred to in the respondent's own certificate of insurance (supra) and which is absolutely devoid of anything to support Garcia's claim that the cocoa in the warehouse was not the cocoa represented by said receipt. At the expense of repetition, said receipt is quoted here, as follows:

"HARBOR STORES CORPORATION
LONG ISLAND CITY

WAREHOUSE RECEIPT #00216		MARKED
1700 Bags Cocoa	1000	GC Superior #33
	700	GC Superior #33
Stores #1B and 2		
WAREHOUSE RECEIPT #00215		MARKED
15,000 Bags Cocoa	3000	GBOA Gold Coast
	11000	SUM Gold Coast GC
	1000	Superior 31
Stores #1A and 2		
WAREHOUSE RECEIPT #00217		MARKED
1780 Bags Cocoa	300	Instituto S.G.G.
	650	Instituto S.H.H.
	800	Instituto G.C.C.
Store #2"		

Cocoa bearing such marks were in the warehouse and sampled by petitioner.

Thus, it appears that the decision below was predicated upon a consideration of the rankest kind of inadmissible hearsay without an opportunity on the part of petitioner

to cross-examine or for a jury to decide the issues. Where documents establish a fact as a matter of law and destroy any issue, we concede that summary judgment is a proper remedy but the purported documents here were (a) not offered in evidence or made part of the record and (b) were clearly inadmissible as hearsay. Therefore, this is indeed a situation which demands a fair and open trial affording an opportunity for cross-examination. *Nickelson* v. *Nestles Milk Products Corp., Inc.*, 5 Cir. 107 F. 2d 17. *United States* v. *Newbury Mfg. Co., et al.*, 1 Fed. Rules Dec. 718. Otherwise, the order and judgment deprive petitioner of its Constitutional right to a jury trial upon the issues.

POINT III.

There is a conflict between the decisions of different Circuit Courts on the issue of law involved.

The respondent must fail since its contention rests upon an assertion that the petitioner had no title to physical property and that the insurance involved in this case was property insurance. We have demonstrated that an issue of fact on this score exists. But, even if this issue were determined adversely to the petitioner, an issue of law still remains on which conflicting determinations have been made by different Circuits.

Huge sums of money change hands in reliance upon pledges of warehouse receipts. Creditors seek to bolster their security through insurance against non-delivery in accordance with warehouse receipts. If such insurance is invalid, in the face of the risk directly intended to be insured against (and respondent's agent to whom the petitioner turned as an expert warranted as agent for the respondent, that petitioner was receiving this protection, Point III, main brief), millions of dollars of financing will go without protection.

The case of *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493, was decided by the Circuit Court of Appeals for the Ninth Circuit. This case and its companion case in the state Court are discussed on pages 17 and 18 of the petitioner's main brief. It is directly in point and holds that insurance under circumstances similar to these is valid and enforceable, notwithstanding the non-existence of specific physical goods. This decision of the Ninth Circuit is in direct conflict with the decision of the Second Circuit in this case.

Therefore, the conflict of decisions between the Second and Ninth Circuits creates an issue of great public importance, justifying review by this honorable Court in addition to the Constitutional grounds for review pressed by the petitioner earlier in this brief.

CONCLUSION.

It is respectfully urged that, for the foregoing reasons, the petition be granted.

Respectfully submitted,

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